

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 21 – PROBATE PRACTICE

JUNE 2022

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

General points on candidate performance

1. Candidates should read the questions thoroughly before answering them, and consider what the question entails before answering.
2. Another problem occurred when dealing with QP 2(a) and 2(c) where candidates repeated the same points for both answers – it is beneficial if candidates read all the questions first.
3. Some candidates decided to write letters when this was not required.
4. The layout of some of the answers could have been improved, for example in Q 2(d) where it asked about Renshu and his claim against the estate, it was best here to deal with his claim first and his chances of success in one paragraph or more, and then the orders open to the court in another and incorporate a heading as well.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

This was answered quite well. Reference was made about the charity number which does not apply for churches.

(b)

There was a lack of knowledge shown here about the powers of the trustees when using their powers of Maintenance and Advancement under the Trustee Act.

(c)

This was answered well with candidates getting the main points.

(d)

This was a question about the duty of care owed by a solicitor and some candidates omitted mentioning this and talked in more general terms when answering this question.

Question 2(a)

Most candidates understood the main issue here.

(b)

There was a mix of answers here and once again those that had considered what the question was asking, namely “partial intestacy”, did well.

(c)

This was well answered.

(d)

This was a more challenging question, and the best answers were those where more thought had gone into structuring the answer.

Question 3(a)

There was a range of different quality answers here. Most people dealt well with what action was needed.

3(b)

This question was answered well, and most candidates grasped the main points here.

(c)

Most candidates performed well.

(d)

Candidates liked this question as it was more general but as stated before, some candidates were missing the main points in favour of some more general points.

Question 4(a)

Most candidates understood the key issues here.

(b)

Most candidates understood the main points of the question.

(c)

This question was answered well.

(d)

This question was answered well.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 21 – PROBATE PRACTICE

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant Facts and Laws • Creating clear and understandable explanations of complex events/procedures • Relevant research • A reasoned conclusion which outlines justifications and is supported with evidence • Response is appropriately structured <p>If the church does not exist when he dies the gift will fail and then form part of the residuary estate. If, however, there is a contrary intention shown in the will then that will take precedence. On the facts there is no contrary intention stating what should happen in this event in the will as it is drawn and is therefore an accretion to the residue.</p> <p>Clause 4 should be redrafted so that it covers this situation: for example, it could say that if this church has changed name or ceases to exist the gift will not fail and will instead go to say another church in the area at the discretion of the trustees and it would be useful to state that the gift is for the churches general purposes unless his instructions are otherwise for example he wants it to be used for a certain project such as the church roof. Credit should be given for saying that the Church described in clause 5 exists at the time the will is drafted.</p>	5
1(b)	<p>If his grandchild required funding the trustees will need to exercise their discretion in deciding whether they comply with this request and shall use professional advice wherever needed</p> <p>1. On looking at clause 8.3 of the will they have a discretion to advance capital to his grandchild. They can use capital (cash) or</p>	8



	<p>property for this purpose provided that the advancement does not exceed her actual entitlement from the estate</p> <p>2. 8.2 of the will this deals with her entitlement to income to maintain her. In this context as she is likely to be over 18, she is entitled to the income as of right and so the trustees should ensure that she is receiving such interest / income from the investment fund where applicable</p> <p>The trustees' powers contained in clause 8 of the Will are in addition to and do not replace the powers which are given to the trustees by statute see <u>Trustee Act 2000</u></p> <p>As regards capital the act says that the trustees can apply cash and/or transfer or apply property in exercising their discretion</p> <p>To conclude the trustees in exercising this discretion they will need to do some research for example to talk to the grandchild herself to see what the money is needed for and if they make a payment for her benefit, they should consider making a payment to the third party direct and make a record like a receipt</p>	
1(c)	<p>The property is the subject matter of <u>a specific devise</u>, and we are told it no longer exists at the date of death and so the gift fails and is deemed see <u>Re Slater and Re Clifford</u></p> <p>What this means is that the beneficiaries of the gift the testator's children do not have the right to any replacement property the testator may have acquired subsequently nor to any proceeds of sale of such property. The house will therefore form part of the residuary estate and go to his wife rather than his children</p>	7
1(d)	<p><u>The primary duty</u> is owed by the solicitor to his client who is Mr Turner here see <u>White v Jones</u> where the court said that the duty extended not just to the preparation of the will where other steps were required to give effect to the testator's intentions</p> <p>There was also a duty owed to the beneficiary, for example, a solicitor was held liable in <u>Ross v Caunters</u> because he did not check the will had been executed properly. In <u>Ross v Caunters</u> it was stated that a duty of care was owed by the will writer to a beneficiary in tort because it was foreseeable that a third party would suffer a loss if the will was invalid</p>	5

	<p>Regarding the question about the will which turned out to be executed wrongly see Ross v Caunters above, where the letter sending out the Will for signing by post it did not warn the testator about the effect of s15 Wills Act 1837. The effect of this was that the gift to the beneficiary was held void under s 15 and the solicitors were held liable for her loss. They have a duty to the testator in contract to advise him in such a way that his wishes would be carried into effect. They had also a duty of care to the claimant in tort. On the facts here Kempstons would be liable if it were found that they had not warned the client about the impact of section 15 above.</p>	
	Question 1 Total:25 marks	



Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>S9 Wills Act 1837 – assuming the testatrix is able and willing to read and sign his will and it is in conventional format and has an attestation clause:</p> <ul style="list-style-type: none"> • Testatrix needs 2 adult witnesses to remain together throughout the signing process • The Testatrix signs it and the witnesses need to watch the testatrix signing it • Each witness then in turn will sign the will watched by the testatrix and the other witness <p>On the facts it does not comply however with s15 Wills Act in that these were not independent witnesses because they were connected in some way being a civil partner and fiancée respectively of the beneficiaries in question However, whilst this means that those gifts are not effective the Will is still valid</p>	5
2(b)	<p>George has died before his mother, and this will create a partial intestacy.</p> <p>George’s entitlement will now be shared by other members of his family in accordance with the intestacy rules. Here the deceased’s spouse Renshu will be entitled to £275,000 plus personal chattels and one half of the residue After this subject to what is left George’s brother will receive (one third) and his sister (one third) and Fred’s children (one third) and if Fred’s children are under 18 it will be held on trust for them on statutory trust until they reach 18 and each will be entitled to their share on reaching 18. The fact that one of Fred’s children is adopted will not affect his entitlement and they will benefit in the same way as the others and get one third shared between them on reaching 18. George’s siblings being Pam’s children could also make a claim against the estate as they have been omitted from the will</p>	5
2(c)	<p>Because Kevin was engaged but not actually married at the time the will was witnessed it does not preclude him from inheriting the golf clubs and it does not invalidate the will. However, there is a problem with the gift of the golf clubs which is a specific gift and given that the testatrix had entered a contract for sale before she died and therefore at the date of death the testatrix’s interest was in the proceeds of sale of the golf clubs and not the clubs themselves and so the gift will not stand</p>	5

Question Number	Suggested Points for Responses	Marks (Max)
2(d)	<p>Renshu is the deceased's husband and has been omitted from the will. He is therefore entitled to make a claim under Section 1, I (PFD)A 1975. The orders a court makes are akin to what would happen if they were divorcing:</p> <p>The following orders are available to the court:</p> <ul style="list-style-type: none"> . Periodical payments order . Lump sum payment . Transfer of property . To vary a trust which has been set up . Property covered by anti-avoidance provisions . The deceased's severable share in any joint tenancy property <p>Depending on the assets in the estate Renshu should stand to inherit around circa 50% of her estate and this will clearly affect the entitlement of the other beneficiaries</p>	10
Question 2 Total:25 marks		
3(a)	<p>As regards the will as it is only a copy you will need to apply for a court order under Rule 57 of the Non-Contentious Probate Rules (1987) admitting the copy to proof. An affidavit should be filed with the court providing evidence of its disappearance and you should also provide the court with a signed copy of the will which has been lost</p> <p>The Solicitor should use the online application facility, or send the papers by post, or personally deliver them to the probate registry.</p> <p>He/she should send to the probate registry:</p> <ul style="list-style-type: none"> • Court order referred to above including a copy of the signed will • Completed PA1P form signed by PR'S • Form 421 as IHT is payable here • The probate court fees by cheque if this was the method of payment or electronically if your firm has an account with HMCTS • Additional evidence if needed 	10

Question Number	Suggested Points for Responses	Marks (Max)
3(b)	<p>The will has been altered since it was made. The general rule states that the amendments made to a Will after execution shall only be valid unless they were done in the same way as the will itself see S 21 Wills Act 1837. It is therefore important to know when these changes were carried out. There is a rebuttable presumption that an unattested alteration without the signature / initials of the testator and the witnesses was made after the testator signed it and therefore not effective</p>	5
3(c)	<p>The Personal Representative needs to check the CGT (Capital Gains Tax) position to ensure there is no capital gains tax payable to HMRC.</p> <ul style="list-style-type: none"> • They should pay any outstanding bills relating to the house or the estate as a whole and raise cash to pay them • They should take instructions from the executor and the residuary beneficiaries on whether to sell or transfer the house to the residuary beneficiaries. They (the beneficiaries) might be able to finance paying out the other beneficiary's share in the house and so the sale is not necessary, but a sale would be the simplest option where you have more than one beneficiary • Consider s36 Administration of Estates Act as to requirements for the assent of the property to the beneficiaries to be valid • Consider assent to PRS rather than to the beneficiaries • Post signing formalities - registration of assent at HMLR 	10
3(d)	<p><u>You will need the following instructions from your client:</u></p> <ul style="list-style-type: none"> • Who he wants to appoint as executor and their full names and addresses • Name and addresses of guardians for any minor children • Whether he wants to include any pecuniary or specific legacies with details provided • Who he wants to leave the residuary estate with a default provision if he or she dies before him • An idea of his assets and liabilities with values and advise in whose name they are held • Had they made a Will before if so, provide a copy or a summary 	5

Question 3 Total:30 marks



Question Number	Suggested Points for Responses	Marks (Max)
4(a)	Before completing the estate administration, the executors must produce accounts for the residuary beneficiaries. The purpose of this is to produce a list of all the assets in the estate all the debts liabilities and expenses paid out and all the legacies and then show the balance left over for distribution among the beneficiaries. Thus, if the intention is to pay the beneficiaries a combination of cash and property then this needs to be shown. The residuary beneficiaries show their approval by signing the accounts and acknowledging receipt of the amount paid to them	5
4(b)	Liability to Capital gains tax arises under the The Capital Gains Act 1992 . It arises if a chargeable person makes a disposal of a chargeable asset, and a profit/ gain is made. The gain is calculated by deducting the acquisition value (being the probate value) from the sale proceeds. There is no annual exemption to deduct if you are a PR (personal representative) but there is certain deductible expenditure and costs that can be set off against the gains. CGT is payable at the rate of 28% as it is a residential property	5
4(c)	This is a tax relief for inheritance tax, and it applies in connection with deaths on or after 6 April 2017. The relief is not automatic and must be claimed for. It allows more of the estate to be charged at 0 per cent. The full amount of the exemption is £175,000 and it applies to the deceased's residence where it is closely inherited which means that the estate goes to the testator's children or remoter issue. Where the value of the estate exceeds 2 million pounds the relief will not apply to the extent the estate exceeds this amount	5
4(d)	Unlike individuals Personal Representatives do not get a personal savings allowance and they pay income tax at the rate of 20%. The interest on the two building society accounts is paid gross of tax with no tax deducted at source. The beneficiaries are treated as receiving it and so it will for them to declare this in their own tax return and obtain a refund of tax if they are non-taxpayers	5
Question 4 Total:20 marks		